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STATE CONSTITUTIONAL LAW—QUALIFIED IMMUNITY—IOWA SUPREME COURT UPHOLDS QUALIFIED IMMUNITY FOR STATE CONSTITUTIONAL TORT CLAIMS.

BALDWIN V. CITY OF ESTHERVILLE, 915 N.W.2D 259 (IOWA 2018).

*Steven Land**

TABLE OF CONTENTS

I. INTRODUCTION

In *Baldwin v. City of Estherville*, the Iowa Supreme Court was called upon to answer the following certified question: "[c]an a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, [section] 1 and [section] 8 of the Iowa Constitution?"[1] Article I, section 8 of the Iowa Constitution tracks the Fourth

* J.D., Rutgers Law School, May 2020.

1. 915 N.W.2d 259, 259–60 (Iowa 2018).

Amendment to the Federal Constitution[2] and states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[3] After appellee Greg Baldwin was mistakenly arrested pursuant to an ordinance that was not—and is still not—a valid and effective ordinance, he filed suit against the city of Estherville, Iowa, and against the arresting officers both individually and in their capacities as officers.[4] The Iowa Supreme Court ruled that qualified immunity "should be available to those defendants who plead and prove as an affirmative defense that they exercised all due care to conform to the requirements of the law."[5]

This Comment aims to provide a clear account of the factual and procedural histories leading to the Iowa Supreme Court's decision in *Baldwin*, as well as the history and development of qualified immunity. It will examine the court's analysis and argue that the court missed the mark in *Baldwin* with respect to both legal and policy implications of critical importance.

II. STATEMENT OF THE CASE

Because the Iowa Supreme Court was answering a certified question, it relied upon the facts as provided by the Federal District Court with the certified question.[6] On November 10, 2013, Officers Matt Reineke and Matt Hellickson of the Estherville Police Department received a report of a complaint regarding the operation of an all-terrain-vehicle ("ATV") on a roadway.[7] A concerned citizen showed the officers a video they took of Greg Baldwin riding his ATV on the roadway, within the city's limits.[8]

2. U.S. CONST. art. I, amend. IV.
3. IOWA CONST. art. I, § 8.
4. *Baldwin*, 915 N.W.2d at 261–62, 264.
5. *Id.* at 279.
6. *Id.* at 261 (citing Bd. of Water Works Trs. of City of Des Moines v. Sac Cty. Bd. of Supervisors, 890 N.W.2d 50, 53 (Iowa 2017); Life Inv'rs Ins. Co. of Am. v. Estate of Corrado, 838 N.W.2d 640, 643 (Iowa 2013)). Pursuant to section 684A.3 of the Iowa Code, "[a] certification order shall set forth the questions of law to be answered and a statement of facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose." IOWA CODE § 684A.3 (2018).
7. *Baldwin*, 915 N.W.2d at 261.
8. *Id.*

After reviewing the video, the officers, as well as their supervisors, concluded that Greg Baldwin had violated a city ordinance.[9] Baldwin was served a warrant and arrested in the parking lot of his grandchild's school, in front of his wife and a large number of other people.[10] However, the parties later agreed that the ordinance was not a valid ordinance in effect at the time that Baldwin operated his ATV on the roadway.[11] The criminal complaint against Baldwin was dismissed.[12]

Baldwin filed a civil suit in Iowa state court against the city and against the officers, both in their individual capacities and in their capacities as officers of the Estherville Police Department.[13] Baldwin alleged common law false arrest, as well as a violation of his rights under article I, section 8 of the Iowa Constitution and under the United States Constitution pursuant to 42 U.S.C. section 1983.[14] The case was removed to the United States District Court for the Northern District of Iowa, which granted summary judgment in favor of the defendant officers on the common law false arrest claim and the section 1983 claim.[15] The District Court certified the following question to the Iowa Supreme Court: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution?"[16]

III. BACKGROUND

Historically, government officials who exercise discretion in the performance of their duties have been afforded immunity from suit in one form or another.[17] While qualified immunity—the defense at issue in *Baldwin*—has been well-developed at the federal level with respect to

9. *Id.* Specifically, the officers thought that Baldwin was in violation of "City Ordinance E-321I.10," which they mistakenly believed was a valid city ordinance that incorporated section 321I.10 of the Iowa Code (prohibiting the operation of all-terrain vehicles upon roadways). *Id.* at 262. In fact, the city had instead incorporated section 321 of the Iowa Code (not section 321I). *Id.* Iowa Code section 321.234, which was incorporated, allows the operation of ATVs on a county roadway. *Id.* at 262–63.

10. *Id.* at 262.

11. *Id.* at 261.

12. *Id.* at 262, 264.

13. *Id.* at 264.

14. *Id.*

15. *Id.* at 264–65.

16. *Id.* at 265.

17. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982) ("Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.' . . . For executive officials in general, however, our cases make plain that qualified immunity represents the norm.").

federal constitutional tort claims against government officials,[18] Iowa has had to play catch-up in the development of its immunities to state constitutional torts.[19] In 2017, the Iowa Supreme Court had occasion to consider the issue in *Godfrey v. State*, but decided the case on other grounds and deferred the qualified immunity question for another day.[20]

At the federal level, officials enjoy immunity from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[21] As the Iowa Supreme Court pointed out in *Baldwin*,[22] the federal standard under *Harlow* is centered on whether it should have been clear to the official that their conduct deprives an individual of their rights.[23]

In Iowa, tort claims against both government entities and government employees are governed by chapters 669 and 670 of the Iowa Code.[24] Both chapters include a discretionary function exception that applies to "[a]ny claim based upon an act or omission of an employee of the state, *exercising due care*, in the execution of a statute . . . ."[25] Thus, both exemptions—applying to state and municipal torts, respectively—impose a due care requirement on officials claiming their protections. It should be reiterated that chapters 669 and 670 of the Iowa Code govern tort claims, and not *constitutional* tort claims, specifically. If that were the case, the inquiry may have stopped there. Alas, that was not the case, and the question of qualified immunity for constitutional tort claims remained an open one in Iowa.

As for the answers that other states have come up with, the *Baldwin* court conducted a detailed study which revealed that fourteen states recognize direct damage actions under their constitutions.[26] Four such

18. *See id.* at 806–08.

19. *Compare Harlow*, 457 U.S. at 817–19 (the United States Supreme Court deciding on qualified immunity in 1982), *with Baldwin*, (the Iowa Supreme Court only reaching the issue in 2018).

20. 898 N.W.2d 844, 879 (Iowa 2017).

21. *Harlow*, 457 U.S. at 818.

22. Baldwin v. City of Estherville, 915 N.W.2d 259, 266 (Iowa 2018).

23. *Harlow*, 457 U.S. at 818–19 ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful . . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.").

24. *See generally* IOWA CODE §§ 669.1–670.13 (2019).

25. IOWA CODE § 669.14(1) (2019) (emphasis added); *see also* § 670.4(1)(C) (2019) (applying the same standard to employees of municipalities).

26. *Baldwin*, 915 N.W.2d at 266.

states—Connecticut, Louisiana, Massachusetts, and New Jersey—follow the model provided by the United States Supreme Court in *Harlow*.[27] Four others—Illinois, Maryland, Mississippi, and New York—have taken a statutory approach and written the contours of government officials' immunities to civil liability into their state tort claims acts.[28] In these states, officials receive whatever immunities are "contained within the tort claims act and are liable only when the act would render them liable."[29] Two states—Michigan and Wisconsin—subject constitutional tort damage claims to a "more demanding legal standard."[30] In Michigan, "for the state to be liable for a constitutional tort, a state 'custom or policy' must have mandated the official or employee's actions."[31] In Wisconsin, plaintiffs have the burden of showing that the there was an intentional violation of the state constitution.[32] California and Texas no longer recognize direct damage claims under their state constitutions,[33] and immunity remains an open question in Montana and North Carolina.[34]

IV. THE COURT'S ANALYSIS

The Iowa Supreme Court answered the certified question by explicitly rejecting strict liability and holding that government officials may claim a form of qualified immunity based on a due care standard.[35]

A. The Court Rejects Strict Liability

The majority first dismissed the notion that strict liability is the proper approach to constitutional torts in Iowa.[36] The majority had four key reasons for so concluding: (1) no other state has adopted the strict

27. *Id.* at 266–68 (citing *Harlow*, 457 U.S. at 818; Fleming v. City of Bridgeport, 935 A.2d 126, 144 (Conn. 2007); Moresi v. Dep't of Wildlife & Fisheries, 567 So.2d 1081, 1094 (La. 1990); Rodriques v. Furtado, 575 N.E.2d 1124, 1127 (Mass. 1991); Brown v. State, 165 A.3d 735, 743 (N.J. 2017)).

28. *Id.* at 268–71 (citing Newell v. City of Elgin, 340 N.E.2d 344, 346–47 (Ill. App. Ct. 1976); Lee v. Cline, 863 A.2d 297, 303–10 (Md. 2004); City of Jackson v. Sutton, 797 So. 2d 977, 1980–81 (Miss. 2001); Brown v. State, 674 N.E.2d 1129, 1137 (N.Y. 1996)).

29. *Id.* at 268.

30. *Id.* at 271.

31. *Id.* (citing Carlton v. Dep't of Corr., 546 N.W.2d 671, 678 (Mich. Ct. App. 1996)).

32. *Id.* at 271–72 (citing Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield, 509 N.W.2d 323, 330 n.5 (Wis. Ct. App. 1993)).

33. *Id.* at 272.

34. *Id.* at 273.

35. *Id.* at 280–81.

36. *Id.* at 275 ("[W]e are convinced that constitutional tort claims in Iowa should be subject to *some limit*.").

liability approach;[37] (2) Iowa precedents recognizing constitutional torts have all involved bad faith conduct;[38] (3) at the time that the Iowa Constitution was adopted, public officials had some form of qualified immunity;[39] and (4) officials would be reluctant to perform their duties if they could be found strictly liable for violating an individual's constitutional rights.[40]

First, the majority quickly pointed out that all other states allow constitutional tort claims against the government to limit liability in one way or another, except for Montana and North Carolina, both of which have not decided the immunity question.[41]

Second, the majority looked at the Iowa precedent that has recognized constitutional torts—*McClurg v. Brenton*, *Krehbiel v. Henkle*, and *Girard v. Anderson*.[42] Here, the court reasoned that strict liability is not the correct standard because each of these cases "involved bad faith conduct, and one of those cases made it clear that malice and lack of probable cause were elements of the claim."[43] The court noted the "exceptional circumstances" in *McClurg v. Brenton*, where a search party illegally forced their way into a home with "little regard for the sensibilities of the plaintiff and his family."[44] The court then characterized *Krehbiel v. Henkle* as "involving egregious misconduct in connection with a search" and noted that the Iowa Supreme Court required a showing of malice and the lack of probable cause for the plaintiff to have a cause of action.[45] Finally, the court dismissed the relevance of *Girard v. Anderson* to the issue presented here because it involved private defendants and a forcible breaking and entering.[46]

Third, the court noted the historical context of qualified immunity in Iowa. Specifically, the court pointed out that government officials received its benefit when the state's constitution was adopted.[47]

37. *Id.* ("[T]he other states that allow [constitutional tort] claims limit liability in some fashion, except for Montana and North Carolina. Those two states have not decided the issue yet.").

38. *Id.* at 275–76 (examining the cases cited in Godfrey v. State, 898 N.W.2d 844, 862–63 (Iowa 2017) for having recognized constitutional torts and explaining that each of those involved "bad faith conduct").

39. *Id.* at 276 (citing Hetfield v. Towsley, 3 Greene 584, 584–85 (Iowa 1852)).

40. *Id.* at 277.

41. *Id.* at 275.

42. *Id.*

43. *Id.*

44. *Id.* (citing 98 N.W. 881, 881–82 (Iowa 1904)).

45. *Id.* (citing 121 N.W. 378, 379–380 (Iowa 1909)).

46. *Id.* at 276 (citing 257 N.W. 400, 400–01, 403 (Iowa 1934)).

47. *Id.* at 275–76 (comparing the rejection of a claim against a justice of the peace for wrongfully taking away the plaintiff's oxen to other constitutional torts alleged against

Fourth, and perhaps most significantly, the court reasoned that officials would be reluctant to perform their duties if they could be found strictly liable for violating an individual's constitutional rights.[48] The court argued that "[t]here is a danger of overdeterrence" in adopting strict liability.[49] The court suggested that the exclusion of illegally obtained evidence is enough of a deterrent against officers crossing the "razor thin" line between "good police work and overzealous police work."[50] Subjecting an officer to personal liability in addition to the above mentioned deterrent, the court said, "could lead him or her to be reluctant to act at all in a gray area."[51]

The court concluded by rejecting strict liability, reasoning that "the threshold of proof to *stop* an unconstitutional course of conduct ought to be less than the proof required to *recover damages* for it."[52] The court's logic is that if every constitutional violation had a remedy in damages, then no limitation—not even a statute of limitations—could be placed on recovery.[53] More on this later.

B. The Court Adopts Qualified Immunity Based on a Due Care Standard

In answering the certified question, the Iowa Supreme Court fashioned Iowa's qualified immunity rule with respect to the state's constitutional rights of persons and protections against unreasonable searches and seizures. The court's answer was as follows:

> Constitutional torts are torts, not generally strict liability cases. Accordingly, with respect to a damage claim under article I, sections 1 and 8, a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law.[54]

The first thing to notice is that the court explicitly declined to follow the United States Supreme Court's approach as expressed in *Harlow*. For the Iowa Supreme Court, *Harlow* "is centered on, and in our view gives

police officers and arguing that in both instances some showing of bad faith, fraud, or malice was necessary).

48. *Id.* at 277.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 278–79.
53. *Id.* at 279.
54. *Id.* at 281.

undue weight to, one factor: how clear the underlying constitutional law was."[55] Instead, the court favored a due care standard because it is "more nuanced" and considers several other factors besides the clarity of the law.[56]

Next, the court declined to simply extend the exceptions already contained in Iowa's existing tort claims act to constitutional torts.[57] Instead, the court said that qualified immunity "should be shaped by historical Iowa common law."[58] For the court, this meant that due care is the standard because "[p]roof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution."[59] The court added that "[b]ecause the question is one of immunity, the burden of proof should be on the defendant."[60]

Before concluding and restating its answer to the certified question, the court noted: "[c]onstitutional torts are torts, not generally strict liability cases."[61]

V. ANALYSIS AND IMPLICATIONS

In its analysis in *Baldwin*, the Iowa Supreme Court missed several important aspects of the issue. This Comment discusses three of those aspects. First, the court missed the mark in insisting that "[c]onstitutional torts are torts, not generally strict liability cases."[62] Second, while the majority reasoned that strict liability for constitutional torts would hinder government officials in the performance of their duties, it failed to see the other side of the coin; a standard as lax as the one announced in *Baldwin* may embolden government officials to play fast and loose with the constitutional rights of individuals. Third, the court is incorrect in its assessment of *Harlow*; when there is a clear constitutional right at stake, due care *requires* government officials not to infringe that right. This Comment argues that the proper standard is that announced in *Harlow*.[63] Finally, as this Comment explains, the

55. *Id.* at 279.
56. *Id.*
57. *Id.* at 279–80.
58. *Id.* at 280.
59. *Id.* at 280 (citing Hetfield v. Towsley, 3 Greene 584, 585 (Iowa 1852); Howe v. Mason, 12 Iowa 202, 203–04 (Iowa 1861)).
60. *Id.* (citing Anderson v. State, 692 N.W.2d 360, 364 (Iowa 2005) (stating that a party asserting discretionary function immunity has burden to prove it)).
61. *Id.* at 281.
62. *Id.*
63. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as

Harlow standard is more procedurally efficient, allowing more qualified immunity cases to be decided as a matter of law on a motion for summary judgment.

A. Constitutional Torts Are Not Just Torts—They Are Constitutional Torts

The majority was wrong to conflate constitutional torts and torts generally.[64] The court did so to argue that strict liability should not be the standard, making the point that "the threshold of proof to *stop* an unconstitutional course of conduct ought to be less than the proof required to *recover damages* for it."[65] Either the court failed to see the fallacy in this argument or it just did not care. If the threshold of proof is ratcheted up for constitutional torts, then, logically, they are not the same as regular torts.

The implication of the majority's argument is that the law need not provide the same level of protection from constitutional harms at the hands of government officials that it provides from tortious harms at the hands of fellow citizens. Indeed, this is the view that some commentators have taken. University of Virginia School of Law Professor Daryl J. Levinson argues that since "government does *not* respond to costs and benefits in the same way as a private firm, . . . none of the prevailing justifications for . . . constitutional torts is adequate, or even very promising."[66] However, if such an argument has any merit, then certainly this is an argument *for* holding government officers personally liable for constitutional torts.

Levinson's premise is that the government *itself* is not deterred by the prospect of paying monetary damages for constitutional torts. If this is the case, then it should be readily apparent that holding government officers personally liable is necessary if constitutional violations are to be deterred at all. In contrast to the government itself, individual government officials, by virtue of their middle-class incomes,[67] are likely to be deterred by the prospect of paying monetary damages should they

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

64. *See Baldwin*, 915 N.W.2d at 281.

65. *Id.* at 278–79.

66. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347–48 (2000).

67. The average salary of a police officer in Iowa is $51,712 per year. *Police Officer Salaries in Iowa*, INDEED (Feb. 9, 2019), https://www.indeed.com/salaries/Police-Officer-Salaries,-Iowa. Such a salary certainly would not insulate officers from the deterrence incentive provided by a potential monetary judgment being entered against them personally.

commit a constitutional tort. If the government itself is not deterred, its individual officers most certainly are.

Other commentators recognize the importance of individual recovery for constitutional torts. For example, James J. Park, of Wachtell, Lipton, Rosen & Katz, pointed out:

> By shifting the attention of the courts to the injury suffered by individuals, constitutional tort actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights.[68]

While Park's article focuses on tort remedies for federal constitutional violations, his argument applies perfectly to state constitutional torts arising under the Iowa State Constitution. This is evident in the search and seizure context because the search and seizure provision in the Iowa State Constitution tracks that of the Federal Constitution.[69] Additionally, people are much more likely to encounter a state or local police officer than a federal officer.

Denying plaintiffs an avenue to recover monetary damages for constitutional torts is tantamount to denying their underlying constitutional rights. This is not as dramatic as it might sound. As Justice Appel, writing for the dissent in *Baldwin*, correctly points out, "[a] lack of remedy drives a stake in the heart of a substantive legal doctrine."[70]

Justice Appel was also right to point out that, historically, America's legal heritage "link[s] 'rights' and 'remedies' in a 1:1 correlation."[71] The remedy afforded to someone in the event that they are harmed is supposed to prevent the harm in the first place. Without a remedy for constitutional torts, Iowans are not protected from them. The majority's decision will bar Iowans from seeking a monetary remedy from certain government officials who *tried their best* not to violate their state constitutional rights.[72]

68. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.–C.L. L. REV. 393, 396 (2003).

69. *See supra* text accompanying notes 2–3.

70. *Baldwin*, 915 N.W.2d at 284 (Appel, J., dissenting).

71. *Id.* (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring)).

72. *Id.* at 279 (majority opinion) ("For purposes of article I, sections 1 and 8, we are convinced that qualified immunity should be available to those defendants who plead and

If anything, *greater* protections should be afforded against constitutional torts. That rights recognized by the Iowa State Constitution are of even greater importance than rights recognized by the courts or the legislature of Iowa is plainly demonstrated by the process for amending the Iowa State Constitution. Like amendments to the Federal Constitution, amendments to the Iowa State Constitution are very difficult to pass.[73] Such difficulty reflects the importance and weight of the rights contained in the constitution. Compare this to an act of the legislature, where a simple majority can swiftly change the law.

B. The Flip Side: Immunity Will Incentivize Constitutional Violations

Considering the importance of constitutional rights, the Iowa Supreme Court again missed the point when it used incomplete, one-sided reasoning to argue that strict liability would "over-deter" good police work.[74] This argument misses the mark for two reasons: (1) it is only an argument against strict liability and does not justify departure from the federal standard set in *Harlow*; and (2) it does not address the possibility that further immunizing officers from civil liability will lead to more "overzealous police work."[75]

First, the majority does not address deterrence in its justification for a due cause standard. Even granting, as this Comment does, that strict liability is not the proper approach, the "over-deterrence" argument does not cut against adopting the *Harlow* standard. *Harlow* is not a strict liability standard. Indeed, the difference between the *Harlow* standard and strict liability may be subtle, but it is nonetheless substantive. *Harlow* opens officers to civil liability for constitutional torts where the constitutional right is clear.[76] This is not strict liability. It simply imposes a civil obligation to refrain from violating clearly established constitutional rights.

Indeed, *Harlow* imposes some form of a negligence regime. In a similar case to *Harlow*, the United States Supreme Court said: "an act

prove as an affirmative defense that they exercised all due care to conform to the requirements of the law.").

73. In Iowa, the General Assembly votes every ten years whether to hold a Constitutional Convention. IOWA CONST. art. X, § 3. If a majority of the general assembly votes to have a Constitutional Convention, delegates to the Convention are then elected. *Id.* If the delegates at that convention vote in favor of an amendment, the amendment is then put to a vote by the people. *Id.* In total, three distinct bodies (the Assembly, the Convention, and the people) must vote for the amendment. *Id.*

74. *Baldwin*, 915 N.W.2d at 277.

75. *Id.*

76. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* text accompanying note 63.

violating a [person's] constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of [people's] daily lives than by the presence of actual malice."[77] Essentially, the Supreme Court said that officers have a duty to know about "settled" and "indisputable" constitutional rights.[78] This is different than strict liability because the underlying right must be clear and established. Thus, under *Harlow*, a government officer may still invoke qualified immunity where the underlying constitutional right is in doubt. This means that the doctrine would still apply where the alleged constitutional violation is still up for debate, such as the right to education[79] or the right to healthcare.[80] In this respect, a regime of strict liability would mean that even in these debatable cases, officers could not raise a defense of qualified immunity. Government officers are "not charged with predicting the future course of constitutional law; hence, to show a lack of good faith, the right infringed must be sufficiently well established before an official can be charged with its knowledge."[81]

Second, the majority's analysis completely leaves out the other side of the "over-deterrence" argument. It is true that the policy objective that animates qualified immunity is "[t]he necessity of protecting police officers from undue interference with their duties and from potentially disabling threats of liability."[82] However, the *Harlow* standard is in complete accord with this objective. Opening officials up to civil liability for violating clearly established constitutional rights is *due interference*.

Moreover, as the dissent properly points out,[83] the majority's own logic cuts against strengthening the immunity of government officials. If

77. Wood v. Strickland, 420 U.S. 308, 321 (1975).

78. *Id.* at 321–22.

79. Commentators debate whether there is a constitutional right to education. *Compare* Jill Lepore, *Is Education a Fundamental Right?*, THE NEW YORKER: A CRITIC AT LARGE (Sept. 10, 2018), https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right, *with* Laurence M. Vance, *Is Education a Constitutional Right?*, TENTH AMEND. CTR. (Oct. 25, 2018), https://tenthamendmentcenter.com/2018/10/25/is-education-a-constitutional-right/.

80. Commentators debate whether there is a constitutional right to health care. *Compare* Roger Stark, *Why Health Care is Not a "Right"*, WASH. TIMES (Apr. 30, 2017), https://www.washingtontimes.com/news/2017/apr/30/health-care-is-not-a-right/, *with* Avik Roy, *Yes, Health Care is a Right – An Individual Right*, FORBES: THE APOTHECARY (Mar. 28, 2013, 12:01 AM), https://www.forbes.com/sites/theapothecary/2013/03/28/yes-health-care-is-a-right-an-individual-right/#22f71d854d66.

81. Wesley Kobylak, Annotation, *Immunity of Public Officials from Personal Liability in Civil Rights Actions Brought by Public Employees Under 42 U.S.C.A. § 1983*, 63 A.L.R. Fed. 744, § 10 (2019).

82. Jenkins v. Keating, 147 F.3d 577, 584 (7th Cir. 1998).

83. Baldwin v. City of Estherville, 915 N.W.2d 259, 289 (Iowa 2018) (Appel, J., dissenting).

the state of the law concerning qualified immunity impacts the behavior of officers, then any swing of the pendulum will have a correlative effect. Thus, if lowering the bar for plaintiffs suing officers will "over-deter" officers, then raising it will under-deter them. Having already discussed the particular importance of constitutional rights, the court should have erred on the side of over-deterrence.

When called upon to balance the state's interest in zealous police work with the public's interest in maintaining individual constitutional rights, courts should not be as quick as the *Baldwin* court was to disregard the latter interest. In fact, as a prophylactic against potential over-zealous police work, they should err to the side of protecting individual constitutional rights.

C. When A Constitutional Right Clearly Exists, It Must Not be Violated

If there must be a qualified immunity doctrine, *Harlow* is the proper test to determine whether an officer may invoke it. However, the Iowa Supreme Court favors a due care approach that effectively expands the circumstances under which an officer may invoke qualified immunity. This is misguided. When a constitutional right is clear, due care should require that right not to be violated. Officers should not be given immunity on the basis of claims that they tried their best not to violate the plaintiff's clearly established constitutional rights.

Harlow immunity shifts the burden to the plaintiff "to demonstrate the existence of a clearly established constitutional right."[84] The Supreme Court of the United States held that a right is "clearly established" if the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[85]

It is important to note here that *Harlow* is not perfect. *Harlow* sets the bar too low for officers to invoke qualified immunity; officers can invoke qualified immunity as long as the right alleged to have been infringed was not clearly established. But while the *Harlow* standard is not perfect, it represents the outer-most bounds for when qualified immunity should ever be invoked under the Federal Constitution, the Iowa State Constitution, or any just constitution. If an officer commits an act in contravention of a constitutional right that is so clearly established "that a reasonable official would understand that what he is doing

84. Denius v. Dunlap, 209 F.3d 944, 950 (7th Cir. 2000) (citing Kernats v. O'Sullivan, 35 F.3d 1171, 1176 (7th Cir. 1994)).

85. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

violates that right,"[86] then all senses of fairness and justice require that such an act not be immunized from personal liability.

The Iowa Supreme Court should have followed the lead of several other states who have adopted the *Harlow* test for qualified immunity to state constitutional claims. One such state is New Jersey.[87] Three years before the *Baldwin* case, the New Jersey Supreme Court explicitly announced that a *Harlow*-style qualified immunity doctrine should be applied to cases with similar legal questions to the one in *Baldwin*:

> In New Jersey, the qualified-immunity doctrine is applied, *in accordance with the Harlow pronouncement*, to civil rights claims brought against law enforcement officials engaged in their discretionary functions, including arresting or charging an individual based on probable cause to believe that a criminal offense has occurred.[88]

In the *Morillo* case, the plaintiff was charged with second-degree unlawful possession of a handgun under New Jersey Statute 2C:39-5(b)(1), even though he told the officers that his handgun was properly registered to him and that he had all of the required paperwork.[89] New Jersey State Police later learned that the plaintiff purchased the handgun with the proper registration and the charges were dropped.[90] Thus, *Morillo*, like *Baldwin*, arose because the plaintiff was charged with an offense that he should not have been charged with. In both cases, more diligent investigative police work could have avoided the false charges.[91]

86. *Id.*
87. *See* Morillo v. Torres, 117 A.3d 1206, 1214 (N.J. 2015).
88. *Id.* (emphasis added).
89. *Id.* at 1209–10.
90. *Id.* at 1211.
91. The New Jersey Supreme Court held in *Morillo* that the civil rights actions against the officers should have been dismissed based on their affirmative defense of qualified immunity. *Id.* at 1209. However, the circumstances in that case differed substantively from those of the *Baldwin* case. In *Morillo*, the officers merely needed to prove probable cause as a factual matter, whereas in *Baldwin*, the officers needed to prove that they arrested the plaintiff based on a valid statute. *See* Baldwin v. City of Estherville, 915 N.W.2d 259, 264 (Iowa 2018); *Morillo*, 117 A.3d at 1214.

New Jersey is not alone in following the United States Supreme Court's lead.[92] As the majority acknowledged,[93] Massachusetts has also adopted a *Harlow*-style qualified immunity doctrine. In *Rodriques v. Furtado*, the Massachusetts Supreme Judicial Court followed the federal standard, reasoning that the Massachusetts State Legislature, in passing the State Civil Rights Act, "intended to adopt the standard of immunity for public officials developed under 42 U.S.C. section 1983 (1988)."[94]

In short, Iowa would not have been alone in following the federal qualified immunity standard announced in *Harlow* for alleged state constitutional violations, had the Iowa Supreme Court chose to do so in *Baldwin*.

D. The Harlow Test Is More Procedurally Efficient

One practical effect of the *Harlow* test is that it allows many more cases involving constitutional torts to be decided as a matter of law. The *Harlow* court cast aside the "subjective good faith" component of qualified immunity in favor of a more streamlined objective good faith standard.[95] In removing the subjective good faith component, the *Harlow* court reasoned: "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."[96] Additionally, the New Jersey Supreme Court followed the United States Supreme Court on this point, stating: "[p]rocedurally, the issue of qualified immunity is one that ordinarily should be decided well before trial, and a summary judgment motion is

92. For further explanation of New Jersey's qualified immunity doctrine, and how it tracks the federal qualified immunity doctrine announced in *Harlow*, see also Brown v. State, 165 A.3d 735, 743 (N.J. 2017) (quoting *Morillo*, 117 A.3d at 1214) ("[New Jersey's] qualified immunity doctrine tracks the federal standard, shielding from liability all public officials except those who are 'plainly incompetent or those who knowingly violate the law.").

93. *Baldwin*, 915 N.W.2d at 267–68.

94. 575 N.E. 1124, 1127 (Mass. 1991).

95. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 649 (1987). As the Article points out, Justice Powell, writing for the majority in *Harlow*, explicitly addressed the concern that the factual determinations necessary to the subjective good faith test allowed too many cases to go to trial:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind.

Harlow, 457 U.S. at 816.

96. *Harlow*, 457 U.S. at 816 (citations omitted).

an appropriate vehicle for deciding that threshold question of immunity when raised."[97]

The due care standard announced by the *Baldwin* court is not so simple. The Iowa Supreme Court's invocation of tortious negligence doctrine in determining the standard of care[98] means that cases where qualified immunity is raised will almost certainly go to a jury. "Lack of due care," as the majority in *Baldwin* says is required,[99] is a classic question of fact for a jury.

The Iowa Supreme Court has previously found that a "generally applicable duty of reasonable care" is a factual question for a jury to determine.[100] The implication of *Baldwin*, therefore, is that the qualified immunity question will lead to a jury question, and hence a full trial in most cases.

VI. CONCLUSION

The Iowa Supreme Court in *Baldwin* upheld a modified form of qualified immunity that adds an extra hoop for plaintiffs suing government officials to jump through. The court's analysis trivializes the importance of constitutional rights, and the form of immunity that it announced will embolden officers to venture deeper into gray areas of law enforcement. Moreover, the due care standard announced by the Iowa Supreme Court will lead to fewer cases being decided on summary judgment, and more cases proceeding to trial to determine the officer's state of mind. Therefore, in grafting a due care standard onto the established federal qualified immunity doctrine, the Iowa Supreme Court diluted the substantive protections afforded to Iowans in their state's constitution and added procedural burdens onto cases in which officer defendants invoke qualified immunity.

97. Morillo v. Torres, 117 A.3d 1206, 1215 (N.J. 2015).

98. *See Baldwin*, 915 N.W.2d at 280.

99. *See id.*

100. Louis S. Sloven, *Who Could Have Seen This Coming? The Impact of Delegating Foreseeability Analysis to the Finder of Fact in Iowa Negligence Actions*, 63 DRAKE L. REV. 667, 667 (2015) (citing Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)).